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Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RICHARD ALLEN JAMES,

Petitioner,

v.

DISTRICT OF COLUMBIA COURT OF APPEALS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED*

I. Can a Court of Appeals, which has the ultimate responsibility for disciplining attorneys, refuse to consider due process deprivations because of an accused's failure to raise those deprivations before the fact finding advisory tribunals acting under a delegation of authority from the Court of Appeals?

II. What actions must an attorney take in a quasi-criminal administrative proceeding to preserve his arguments before the ultimate adjudicating authority, that he has been denied his right to receive prior notice of the charges against him and an opportunity to be heard?

III. Where the rules governing disbarment proceedings provide that an attorney has the right to be heard in mitigation, is the attorney deprived of due process when he is informed prior to the hearing that he would be afforded a second hearing to present such mitigation evidence and then is refused that opportunity without notice?

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* The parties below were Richard Allen James, petitioner herein, and the Office of the Bar Counsel of the District of Columbia.

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OCTOBER TERM, 1982

RICHARD ALLEN JAMES,

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DISTRICT OF COLUMBIA COURT OF APPEALS,

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Richard Allen James, petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the District of Columbia Court of Appeals, entered in the above-entitled case on October 21, 1982.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported in 452 A.2d 163 and is printed in Appendix A, *infra*, page 1a. The Report and Recommendation of the District of Columbia Court of Appeals Board on Professional Responsibility is printed in Appendix B, *infra*, page 16a. The Report of Hearing Committee Number Nine of the Board on Professional Responsibilty is printed in Appendix C, *infra*, page 39a.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on October 21, 1982. No petition for rehearing was filed in that Court. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The disciplinary rules of the American Bar Association's Code of Professional Ethics have been incorporated into the District of Columbia Court of Appeals by Rule

XI, § 2. The disciplinary rules at issue herein are: DR 1-102(A)(4), DR 1-102(A)(5), DR 1-105(A)(4), DR 5-104(A), DR 6-101(A)(3), DR 7-101(A)(1), (2), and (3) and DR 9-102(A). Also involved is District of Columbia Court of Appeals Rule XI, § 7(2). The texts of the disciplinary rules and court rule are set forth in full in Appendix C, *infra*, page 67a.

STATEMENT OF THE CASE

This is a bar disciplinary proceeding in which the District of Columbia Court of Appeals confirmed the Board on Professional Responsibility's ("the Board") findings that the petitioner, Richard Allen James ("James"), had violated several disciplinary rules and accepted the Board's recommendation that he be suspended from the practice of law in the District of Columbia for two years. Prior to these proceedings, James had practiced in the District of Columbia for approximately ten years and had an unblemished record.

The disciplinary proceedings against James involved his representation of clients in two different cases. However, the discipline recommended by the Board was premised on the Board's findings with respect to one of those cases, his representation of Louvenia A. Coverdale ("Coverdale"). Since the issues presented for review in this petition relate only to the Coverdale case, only its facts will be summarized here.

In September, 1978 Coverdale retained James to represent her in defending a personal injury case brought against her by James Stevenson ("Stevenson"), who claimed to have been injured in a building owned by Coverdale and in which he was a tenant. In October, 1979 the parties reached an agreement in which Mrs. Coverdale agreed to pay Stevenson $1,250 within 15 days

and the suit was dismissed. James billed Mrs. Coverdale $1,500 for his services in the case. No issue has ever been raised regarding the reasonableness of those fees. Coverdale, however, was unable to satisfy the settlement within the required time and Stevenson refused to accept payment in installments. Coverdale then sent James a series of checks beginning with a check for $350 on November 3, 1979. The first check contained a notation on its face indicating that $300 was for James' fee and $50 was for the settlement. (Hearing Committee Report, Appendix C, page 42a.) James called Coverdale and told her that Stevenson had rejected the installment payment proposal. (Hearing Committee Report, page 4; Appendix C, page 42a.) Coverdale then sent James three checks for $400 each in December, 1979, January and February, 1980. The December and January checks contained no notations as to how they should be allocated. The February check contained a notation indicating that it was for both James' fee and the settlement. James deposited the February check in his escrow account.

James' and Coverdale's testimony differed as to how they had agreed to allocate the payments between the settlement and James' fee. James testified that he had explained to Mrs. Coverdale that installment payments were unacceptable to the plaintiff and that the plaintiff would seek to set aside the settlement. He therefore applied the first three checks to his fee and deposited the last one in his escrow account. (Hearing Transcript, page 169.) He also testified that even if he were to have understood that Mrs. Coverdale wanted him to use the checks to cover the settlement, he could not have made the payments because the plaintiff had no fixed address or attorney in the record. (Hearing Transcript, page 170.) Coverdale testified that she thought James had

agreed to pay off the settlement first and she then would pay him. (Hearing Transcript, page 130.)

Stevenson's original attorney had withdrawn from the case because he believed that Stevenson was dishonest and manipulative in trying to overturn the settlement. (Respondent's Exhibit 4.) James testified that in December, 1979 he had received a call from a person identifying himself as Stevenson's new lawyer who claimed that the settlement was supposed to be $12,500 not $1,250. (Hearing Transcript, page 158; see also Hearing Committee Report, page 5, Appendix C, page 181.)

The Board found that James was obligated to apply the checks first to the settlement until it was satisfied and then to his fee, even though he had no place to send them and no one to accept the payments.

In February, 1980 Stevenson through his new counsel filed a motion in the Superior Court for the District of Columbia to set aside the settlement. Argument on plaintiff's motion was held on April 30, 1980. During this argument Stevenson's counsel took the position that, since the settlement had not been paid within the required 15 days, the settlement agreement had been breached and the case should be reinstated. James informed the Court that Coverdale had been unable to pay the judgment on time, that she had been sending him money, that he had been keeping the balance over his fee in an escrow fund, that the amount in the escrow fund was about $350 (it was in fact $400) and that Mrs. Coverdale had not made a payment in three months on his advice after receipt of Stevenson's motion (actually the payments were suspended for only two months). The court at first indicated that it would be inclined to deny the motion if Coverdale would pay the settlement immediately. James asked for 15 days to speak to his client

and arrange for her payment, and even offered to satisfy the settlement out of his fee if necessary. He explained that the settlement had not been paid before because of the difficulty in locating the plaintiff. Stevenson's counsel argued that James' offer was already too late since the settlement agreement had been breached when Coverdale had not made timely payment. The Court granted the plaintiff's motion.

The District of Columbia Bar Rules, as adopted by the District of Columbia Court of Appeals, provide that disciplinary proceedings are initiated by Bar Counsel by a petition which is filed with the Board and served on the accused. The petition "shall be sufficiently clear and specific to inform the respondent of the alleged misconduct." (Rule XI, § 7(2), Appendix D, page 68a.) After the accused files an answer with the Board, the matter is assigned to a hearing committee, consisting of three members which, if issues of fact are raised by the pleadings, must hold a hearing including a hearing with respect to mitigation of sanctions. At the hearing the accused is entitled to be represented by counsel, to cross examine witnesses, and to present evidence. Following the hearing, the committee submits a report with findings and recommendations to the Board. The Board receives briefs from the parties, hears oral argument and either affirms or modifies the recommendation of the hearing committee. The Board submits a report with its findings and recommendations to the Court of Appeals. If the accused filed exceptions to the Board's Report, the Court schedules briefs and oral argument. Upon conclusion of the proceedings, the Court of Appeals enters an order. The Court of Appeals accepts the Board's findings unless they are unsupported by substantial evidence and adopts the Board's recommended sanctions unless inconsistent with prior dispositions for comparable conduct. The

Court of Appeals is the ultimate deciding authority. It is the Court which issues the order of disbarment or suspension. The Board and Hearing Committee are merely advisory bodies to the Court. (Rule XI, § 7, Appendix D, page 67a.)

The investigation into James' representation of Mrs. Coverdale began on February 5, 1980, in response to Stevenson's complaint to the Bar Counsel. On July 16, 1980, the Petition in the matter was served on James. Among other charges, the Petition alleged that James had "violated Disciplinary Rule 1-102(A)(5) by engaging in conduct prejudicial to the administration of justice as alleged in paragraph 7."

Paragraph 7 set out the specific conduct on which this charged was based:

> (7) On February 29, 1980, plaintiff [Stevenson] filed a Motion for Relief from Order requesting the Court to set aside the settlement entered on October 15, 1979 and permit the plaintiff to proceed to trial. *In opposing this motion on behalf of Ms. Coverdale, respondent represented to the Court that he had been unaware of the plaintiff's whereabouts. That statement was false and respondent knew or should have known that it was false.*

(Emphasis added.)

The only hearing in the disciplinary proceedings was held on December 16, 1980. James appeared *pro se.* On page 164 of a 207 page transcript, the Hearing Committee Chairman raised a new issue:

> CHAIRMAN: Mr. James, *I have a deeper concern about this case.* You appeared before Judge Fauntleroy on April 30, 1980, on a motion to reopen the record on the grounds that a settlement had not been paid.

MR. JAMES: That's right.

CHAIRMAN: By that time, you had received four checks from Mrs. Coverdale totaling an amount of $1,550, excluding your retainer, payments made after the settlement was made by Mrs. Coverdale, and the evidence of three of those checks is in the record here, and the fourth we will agreed was paid.

I notice nowhere in your argument to the Court that you ever advised the Court that Mrs. Coverdale paid any money. The clear impression that the Court must have had, as I did, when I read the transcript of that hearing, was that Mrs. Coverdale had reneged on her obligation.

MR. JAMES: I would like to read that.

CHAIRMAN: I suggest that you do so. I don't want to waste time in the hearing now, but in your brief that follows this case, memorandum, if you choose to file one, I would like you to focus on that question.

MR. JAMES: Now, what's the question?

(Hearing Transcript, pages 164-65, emphasis added.)

This exchange was the first time that James was on notice that other matters addressed at the motions hearing were of interest to the Committee and even then he was not informed that his statements to Judge Fauntleroy with respect to the payments made by Mrs. Coverdale might form the basis of discipline.

In their reports the Hearing Committee and the Board pointed to this conduct at the hearing as the basis for finding a violation of DR 1-102(A)(5). The Committee explicitly declined to decide whether the conduct originally charged—James' representation to the Court that he was unaware of plaintiff's whereabouts—was a violation. (Report of Hearing Committee, Appendix C,

page 56a.) The Committee and the Board found that Respondent failed to advise the Court that Mrs. Coverdale's total payments to Respondent were sufficient to satisfy the settlement, that she had not made a payment in three months at his suggestion and that James stated that she was unable to pay faster because of financial difficulties. According to the Committee and the Board these statements were evasive and deceptive and constituted conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5). To date, James has never been charged with that conduct.

The charge that James misled the Court was a major factor in the severity of the sanction imposed. "In our view, however, Respondent seriously compounded his wrongdoing by the evasions and misrepresentations he engaged in with the court and his client. . . ." (Board on Professional Responsibility Report at 22, Appendix B, at 37a.)

On December 9, 1980 and prior to the hearing, the Chairman of the Hearing Committee wrote to the parties instructing them that the issue of appropriate discipline would be deferred to a later date, after the determination of the question of liability. (Appendix F, page 82a.) In reliance on that instruction, James was not prepared to present any evidence as to mitigation. However, at the close of the hearing the Chairman asked James if he had any mitigation evidence to present. James indicated that he would like to bring in character witnesses but the Chairman decided that any mitigation material could only be presented in James' post-hearing memorandum.

In his post-hearing memorandum, James specifically requested that, if the Committee should find against him as to liability, he be provided with the opportunity of

a mitigation hearing which the Chairman's December 9, 1980 letter had indicated he would receive. He proffered that such evidence would include the following: "(a) mitigating circumstances; (b) petitioner's prior good record and lack of disciplinary complaints; (c) petitioner's previous good reputation as an attorney; (d) the absence of evil or fraudulent intent related to any disciplinary infraction; and (e) respondent's willingness to admit any negligence or wrongdoing if such were found by [the] Committee."

In response to that request, in a letter to James' newly obtained counsel dated February 20, 1981, the Chairman of the Hearing Committee denied James the right to have a hearing as provided for in the Rules, the Petition and the Chairman's December 9 letter, provided 15 days for James to provide written materials concerning prior record and reputation (Items (b) and (c)); and denied him the right to further address the other three areas of proffered evidence. (A copy of that letter is attached hereto as Appendix F, page 86a.) In his Exceptions to the Board's Report, James again raised the issue of his opportunity to present mitigation evidence.

The report of the Hearing Committee, which first recommended a sanction based upon conduct not contained in the charges, was not issued until after both the hearing and James' post-hearing briefs. Thus, James had no opportunity to raise at the hearing committee level his right to notice. James first raised the issue with respect to whether his due process right to notice was violated in his brief before the Court of Appeals, after the Board had issued its recommendations. The Court of Appeals held that James' failure to raise this issue at both the Hearing Committee and Board levels constituted a

waiver of that issue and declined to resolve the merits of the claim that he was deprived his due process right to prior notice of the charge against him and the opportunity to defend against that charge.

REASONS FOR GRANTING THE WRIT

I.

THOUGH THIS COURT IN *IN RE RUFFALO* HAS RULED THAT AN ACCUSED IN AN ATTORNEY DISBARMENT PROCEEDING IS ENTITLED TO FAIR NOTICE OF THE CHARGES AGAINST HIM AND AN OPPORTUNITY TO DEFEND AGAINST THOSE CHARGES, THIS COURT HAS NEVER ADDRESSED WHAT PROCEDURES AN ACCUSED MUST TAKE TO PRESERVE THOSE RIGHTS BEFORE ADMINISTRATIVE TRIBUNALS

In 1968, this Court held that "[d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. He is accordingly entitled to procedural due process, which include fair notice of the charge." *In re Ruffalo*, 390 U.S. 544, 550 (1968). In the instant case, James was served with notice that he had violated DR 1-102(A)(5) (conduct prejudicial to the administration of justice) when he represented to the Motions Judge of the District of Columbia Superior Court that he did not know Stevenson's address.

James was found to have violated DR 1-102(A)(5), not because of the conduct for which he was charged, but because he allegedly misrepresented to the Superior Court the amounts, nature and circumstances surrounding the receipt of payments from Coverdale. To date, he has never been found guilty of the offense charged—misrepresenting to the Court his knowledge of Stevenson's

address—and has never been officially charged with the offense of which he was actually found guilty—misrepresenting the circumstances surrounding Coverdale's payments. *Ruffalo* held that such a procedure violates due process:

> [T]he charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.
>
> How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows.

Id. at 541 (footnote omitted).

In *Ruffalo* the charges were formally amended and Ruffalo had several months to respond to the new charge. In this case, the charges were never amended and James has never had any opportunity to be heard on the new charge.

The first suggestion that other matters discussed in the motions argument might be at issue arose about three-quarters through the disciplinary hearing when the Chairman rather vaguely remarked that he had a "deeper concern" about the case. The Chairman went on to mention James' failure to advise the Court that Coverdale had paid any money but did not mention any of the other areas in which James was eventually found to have misled the Court. James was not on notice that an additional charge was being made.

Rather than address the due process deprivation which this Court recognized in *Ruffalo*, the District of Colum-

bia Court of Appeals held that by James' failure to raise the issue at the Hearing Committee or the Board level he ". . . waived his right to have this isssue resolved in this case." (Appendix A at 12a.)

This decision is contrary to the implied but not expressed holding of *Ruffalo*. While the opinion of the Court did not address the issue of waiver, Justice White's concurring opinion explicitly declined to consider the due process notice issue because Ruffalo had not raised it either in the Sixth Circuit or in this Court. *In re Ruffalo*, 390 U.S. 544, 553. While the Court's opinion did not explicitly discuss Justice White's objection, it appears that the Court addressed the merits of the due process issue because the failure to notify the accused of the charge for which he may be punished is a fatal due process defect and that a hearing based on charges of which the accused is not on notice is no hearing at all. *Id.* at 549-51.

This Court has held that before one can be found to have waived a fundamental constitutional right his waiver must be both knowing and intelligent. *Gardner v. Florida*, 430 U.S. 349 (1977); *Henry v. Mississippi*, 379 U.S. 443 (1965); *Fay v. Noia*, 372 U.S. 391 (1963). In this case, James has never been given notice of the exact conduct for which he was found to have violated DR 1-102(A)(5) and, therefore, without such notice, could not be said to have knowingly waived his right to notice of the charges against him.

If the District of Columbia Court of Appeals' decision is permitted to stand, then this Court's holding in *Ruffalo* will become meaningless. By finding that an attorney violated a Disciplinary Rule through conduct which was not contained in the original charge, and

which was never the subject of an amended charge, the Court of Appeals has left the accused to not only guess at the conduct for which he may have to answer, but also to anticipate that the Hearing Committee and Disciplinary Board will discipline him for conduct for which he was never charged.

The "trap" which this Court described in *In re Ruffalo*, 390 U.S. 544, 551, becomes no less a trap simply because the accused does not know what ensnared him until after the harm has been committed and his right to due process had been denied.

This Court has recognized that the issue of whether there has been a waiver of a federal right is a federal question, *Henry v. Mississippi*, 379 U.S. 443 (1965). It has not, however, addressed the issue of whether failure to raise a *Ruffalo* defect constitutes a knowing and intelligent waiver, particularly in a situation where the charges and specifications were never amended to reflect the new charge. This constitutional issue which was not explicitly resolved by this Court's decision in *Ruffalo* needs to be answered and requires this Court's resolution.

II.

WHETHER AN ACCUSED IN A QUASI-CRIMINAL PROCEEDING HAS A DUE PROCESS RIGHT TO A HEARING AT WHICH HE CAN PRESENT MITIGATION TESTIMONY IS A QUESTION WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT

It is well established in criminal cases that the sentencing process as well as the trial itself must satisfy the requirements of the due process clause. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). While this Court has never clearly delineated the form of procedure required by due process in sentencing proceedings either in criminal or quasi-criminal cases, it is clear that it includes some opportunity to present mitigating evidence and, in some circumstances, a full judicial hearing. *Specht v. Patterson*, 386 U.S. 605 (1967). Lower courts have held that in criminal cases it is a denial of due process for a court to refuse a defendant's request to speak to the sentencing court, *Ashe v. State of North Carolina*, 586 F.2d 334 (4th Cir. 1978), *cert. denied*, 441 U.S. 966 (1979); to deny a defendant the opportunity to rebut factual assumptions relied upon by the court in determining the sentence, *United States v. Gonzalez*, 661 F.2d 488 (5th Cir. 1981); or to rely on inaccurate information in determining a sentence, *United States v. Jones*, 640 F.2d 284 (10th Cir. 1981). Even in ordinary administrative adjudications, where liberty or due process property interests are at stake, courts have held that an accused must have an opportunity to present mitigation testimony at a hearing. *Christhilf v. Annapolis Emergency Hospital Ass'n, Inc.*, 496 F.2d 174 (4th Cir. 1974); *Preston v. Piggman*, 496 F.2d 270 (6th Cir. 1974).

This Court has yet to address the extent or nature of an accused's right to allocute as to sentencing or to

present mitigation evidence at a hearing with respect to quasi-criminal proceedings. This question is a frequently recurring one that should be addressed by this Court.

Refusal to give James a hearing at which he could present mitigation evidence was extremely prejudicial in this case. The Hearing Committee based its recommended sanction in large part on James' demeanor and conduct during the hearing. It interpreted James' attitude as "cavalier" and concluded that he was unaware of his responsibilities as a lawyer. (Hearing Committee Report, pages 24-25, Appendix C, page 60a.) However, the Hearing Committee's impressions had been formed at a hearing which James had been told would be limited solely to the issues of liability.

Had a second hearing been held, as James was led to believe would be done, he could have expressed his willingness to admit to whatever wrongdoing the Committee found, produced evidence in mitigation, and present evidence of his absence of evil or fraudulent intent. An opportunity to present written materials was no substitute for the opportunity to make a personal statement to the Hearing Committee and to present live witnesses. In short, in reliance on the Chair's *sua sponte* decision to bifurcate the hearing between liability and mitigation, James has been denied his opportunity and his right to be heard in mitigation, and his proposed punishment has been based on his assertion of his innocence without providing an opportunity to allocute as to sentencing.

III.

WHERE THE BAR RULES PROVIDE THAT THE ACCUSED IS ENTITLED TO A HEARING ON THE ISSUE OF MITIGATION, THE DENIAL OF THE HEARING IS A VIOLATION OF DUE PROCESS AND IS IN CONFLICT WITH PREVIOUS DECISIONS OF THIS COURT

Whatever may be the precise procedural safeguards to which an accused in a quasi-criminal proceeding is constitutionally entitled, the procedure here varied with the procedural rights established by the Bar rules and, for that reason, constituted a denial of due process. An essential aspect of due process is the right to be tried by a tribunal "governed by rules of law previously established." *Kilbourn v. Thompson*, 103 U.S. 168 (1881). With regard to ordinary administrative proceedings this Court has affirmed the basic principle that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).[1]

An attorney disciplinary proceeding is more than an ordinary administrative adjudication. As this Court recognized, a disciplinary proceeding is "quasi-criminal" in nature. *In re Ruffalo*, 390 U.S. 544, 551 (1968). James has been denied his right to allocation[2] which

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[1] *See also Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). Lower courts have consistently considered these cases to be based on the Due Process Clause. *See United States v. Caceres*, 440 U.S. 741, 758 n.1 (1979) (Dissenting Opinion).

[2] This Court recognized the importance of this right in *United States v. Behrens*, 375 U.S. 162 (1963).

right is guaranteed to respondents in the District of Columbia disciplinary proceedings by Rule XI, § 7(2) (Appendix D, page 69a). The Board of Professional Responsibility cannot, any more than any other administrative agency, arbitrarily deprive James of a procedural safeguard provided by its rules by first informing him that the question of mitigation would be deferred until after the hearing on liability (Appendix F, page 82a) and then suddenly demanding at the hearing that he present evidence immediately or forego his right to a hearing on mitigation.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari to the District of Columbia Court of Appeals should be granted.

Respectfully submitted,

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